

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**DONALD E. SCHIPPOREIT,**

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF  
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI03-4

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** April 18, 2003.

**DATE OF RENDITION:** April 20, 2003.

**DATE OF ENTRY:** Court clerk's file-stamp date per § 25-1301(3).

**APPEARANCES:**

For appellant: Rodney J. Palmer without appellant.

For appellee: David M. Streich, Brown County Attorney, on behalf of  
Nebraska Attorney General.

**SUBJECT OF JUDGMENT:** Decision on the merits on petition for review under  
Administrative Procedure Act.

**FINDINGS:** The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. As the Nebraska Court of Appeals has restated, proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721, 619 N.W.2d 78 (2000). However, where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. *Law Offices of Ronald J. Palagi v.*

*Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Chrysler Corp. v. Lee Janssen Motor Co.*, *supra*.

2. The court has considered all of the claims asserted in the petition for review. However, the court does not discuss in detail those issues clearly lacking any legal merit. See *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8<sup>th</sup> Dist., 2001).

3. The appellant asserts that the law enforcement officer's testimony was insufficient on several matters. However, these arguments rest upon the erroneous assumption that the appellee had the burden of proof on the issues at the hearing. The department bears an initial burden of production to make a prima facie case for revocation. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). It meets that burden by the proper introduction of the officer's sworn report. *Id.* It then becomes the licensee's burden to establish grounds for reversal by a preponderance of the evidence. *Id.* The motorist in an administrative license revocation appeal bears the ultimate burden of proof once the sworn report is properly received in evidence. See also *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002) (department is free from establishing the foundational elements necessary for the admission of a test in a driving under the influence prosecution). The appellant failed to meet that burden.

4. As in *State v. Dedmond*, 201 Neb. 455, 267 N.W.2d 774 (1978), the appellant's argument regarding Exhibits 6-1 and 6-2 comes close to being frivolous. *State v. Applegarth*, 196 Neb. 773, 246 N.W.2d 216 (1976) (authenticated record certifying the suspension of an operator's driving privilege is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence).

5. Upon de novo review, the court finds by the greater weight of the evidence:

a. The arresting officer had probable cause to believe that the appellant was operating or in actual physical control of a motor vehicle in violation of § 60-6,196; and,

b. The appellant was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1).

6. The decision of the director should be affirmed.

**JUDGMENT:**

IT IS THEREFORE ADJUDGED that:

1. The order of revocation rendered on February 5, 2003, is affirmed.

2. The suspension of such revocation on appeal under NEB. REV. STAT. § 60-6,208 (Reissue 1998) is dissolved, and the full period of revocation shall run from the date this judgment becomes final.

3. Costs on appeal are taxed to the plaintiff-appellant. Any request for attorneys' fees, express or implied, is denied.

Signed at **Ainsworth**, Nebraska, on **April 20, 2003**;  
DEEMED ENTERED upon file stamp date by court clerk.  
If checked, the court clerk shall:

BY THE COURT:

☒ Mail a copy of this order to all counsel of record and any pro se parties, **including both the Brown County Attorney and the Nebraska Attorney General.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

☒ Note the decision on the trial docket as: [date of filing] **Signed "Judgment on Appeal" entered.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

☒ Mail postcard/notice required by § 25-1301.01 within 3 days ("Revocation order affirmed; stay dissolved; costs taxed to appellant").  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

☐ Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

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William B. Cassel  
District Judge

Mailed to: